

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KFD ENTERPRISES, INC.,

No. C-08-4571 MMC

Plaintiff,

**ORDER GRANTING WITH LEAVE TO
AMEND THIRD-PARTY DEFENDANT
KENNETH DAER'S MOTION TO
DISMISS**

v.

CITY OF EUREKA,

Defendant.

_____ /

And related counter and cross claims.

_____ /

Before the Court is third-party defendant Kenneth Daer's ("Daer") "Motion to Dismiss Portions of the First Amended Counterclaim and Third-Party Complaint of City of Eureka," filed August 10, 2009. Third-party plaintiff City of Eureka ("the City") has filed opposition, to which Daer has replied.¹ Having read and considered the papers filed in support of and in opposition to the motion, the Court rules as follows.

1. The Fourth through Eleventh Causes of Action, by which the City alleges violations of California law arising out of alleged environmental contamination,

¹ By order dated September 30, 2009, the previously scheduled hearing on the motion was vacated.

are, for the reasons stated by Daer, subject to dismissal to the extent they are alleged against Daer. Specifically, as to each such claim, the City has failed to allege facts sufficient to constitute a cause of action against Daer, either based on his own conduct or as the alter ego of plaintiff/counter-defendant KFD Enterprises, Inc. See, e.g., Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level."). Further, contrary to the City's contention, the Court, in its July 20, 2009 order, did not preclude Daer's filing the instant motion to dismiss. Compare Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1998) ("[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense."), with Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"); see also Netbula, LLC v. Distinct Corp., 212 F.R.D. 534, 539 (N.D. Cal. 2003) ("Ordinarily, courts will defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted and the amended pleading is filed.")

2. The City's request for leave to amend will be granted. See Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

CONCLUSION

Daer's motion to dismiss is hereby GRANTED and the Fourth through Eleventh Causes of Action in "Counter-Claimant and Third-Party Plaintiff City of Eureka's First-Amended Complaint" are hereby DISMISSED with leave to amend, to the extent they are alleged as against Daer. The City's Second Amended Complaint, if any, shall be filed no later than November 13, 2009.

IT IS SO ORDERED.

Dated: October 19, 2009


MAXINE M. CHESNEY
United States District Judge